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No. ....

IN THE

**Supreme Court of the United States**

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FILED

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LEONARD STEVAS,  
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October Term, 1982

LUIGI MARRE LAND AND CATTLE COMPANY,

*Petitioner,*

vs.

PACIFIC GAS AND ELECTRIC COMPANY, and JOHN F. READY,  
Trustee in Bankruptcy,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

**RESPONDENTS' BRIEF IN OPPOSITION.**

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**Question Presented.**

Whether the admission against a closely-held family corporation of former testimony of an officer and director given in a related proceeding, and exhibits associated therewith, result in a denial of due process of law.

## TABLE OF CONTENTS

	Page
Question Presented .....	i
Statement of Case .....	1
1. This Case Does Not Present an Issue Upon Which There Is a Conflict Among the Decisions of the Various Courts of Appeal nor a Significant or Recurring Issue Necessitating Resolution by This Court, but Instead Merely Involves the Appli- cation of an Unambiguous Rule to the Particular Facts of This Case .....	4
2. The Question Presented in Cattle Company's Peti- tion Was Not Raised at Any Stage of the Pro- ceedings Below .....	5
3. In Any Event, Cattle Company's Claim Is Not Meritorious .....	5
Conclusion .....	8
Appendix. List of Subsidiary and Affiliate Corporations ..... App. p.	1

## TABLE OF AUTHORITIES

### Cases

Duignan v. United States, 274 U.S. 195 (1927) .....	5
Martin v. Webb, 110 U.S. 7 (1884) .....	7
Thompson v. Carley, 140 F.2d 656 (8th Cir. 1944) .....	7

### Statutes and Rules

Fed. R. Civ. P. 32(a)(2) .....	3
Fed. R. Evid. 801(d)(1) .....	7
Fed. R. Evid. 801(d)(2)(C) .....	7
Fed. R. Evid. 801(d)(2)(D) .....	3, 4, 7

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**RESPONDENTS' BRIEF IN OPPOSITION.**

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**STATEMENT OF CASE.**

Petitioner Luigi Marre Land and Cattle Company ("Cattle Company") is a closely-held family corporation owned by the Marre family, whose principal asset is several thousand acres of land near San Luis Obispo, California known as the Marre Ranch.

In 1966, Cattle Company leased a portion of the Marre Ranch to a newly-created Marre family corporation, San Luis Obispo Bay Properties, Inc. ("Properties"). This lease, known as the Properties Lease, is for a term of 99 years with a 99-year renewal option.

In 1968, Cattle Company leased another portion of the Marre Ranch, known as the Diablo Parcel, to another newly-created family corporation, Diablo Canyon Corporation ("Diablo"). This lease, known as the Diablo Lease, is also for a term of 99 years with a 99-year renewal option.

In 1974, Properties and Diablo, as well as two other Marre family corporations (but not Cattle Company), filed voluntary petitions under Chapter XI of the Bankruptcy Act. In 1977, all of these debtors were adjudicated bankrupt, and respondent John F. Ready ("Trustee") was appointed trustee in bankruptcy for each estate.

In 1977, several months after adjudication, the Trustee entered into a settlement agreement with respondent Pacific Gas and Electric Company ("PG&E"), a major creditor of the four estates, whereby the Trustee agreed to convey to PG&E the entire leasehold interest under the Properties Lease, and a portion of the leasehold interest in the Diablo Lease. The settlement required the Trustee to bring on a proceeding in the Bankruptcy Court to determine that the Properties Lease and the Diablo Lease were in full force and effect and could not be terminated, that the Properties Lease and a portion of the Diablo Lease could be assigned to PG&E by the Trustee, and the amount of rent due under each lease. Accordingly, the Trustee commenced two adversary proceedings against Cattle Company in the Bankruptcy Court (in which PG&E intervened) to obtain such determinations.

The Bankruptcy Court determined that both leases were in full force and effect, could not be terminated, and could be assigned by the Trustee. The Bankruptcy Court further determined the amount of rent due and credits to which the Trustee was entitled, and held that Cattle Company's pre-bankruptcy rent claims should be subordinated to payment of all other non-insider claims.

Among the issues litigated below was the relationship between the various Marre family members and entities. Specifically, the court was presented with the issue of whether the "close connection" between Cattle Company, Properties and Diablo should (i) bar enforcement of any otherwise

applicable termination clauses in the two leases, and (ii) cause the rent claims of Cattle Company to be equitably subordinated to payment of non-insider claims.

These issues had been covered in detail in a related state court action to which PG&E, Cattle Company, Properties, Diablo and other Marre family members and entities were parties. In the state court action, PG&E alleged and proved, among other things, that the various Marre family members and entities were alter egos of one another. The testimony in the state court action, which was contained in a multi-volume transcript, was primarily that of Robert B. Marre, an officer and director of Cattle Company, Properties and Diablo. Rather than spending weeks eliciting the testimony again from Mr. Marre,<sup>1</sup> the Bankruptcy Court admitted the transcripts as direct evidence, subject to the right of Cattle Company to rebut or otherwise refute the testimony.<sup>2</sup>

The sole issue raised by Cattle Company in its Petition for Writ of Certiorari concerns the admission of this evidence from the state court action. The Court of Appeals affirmed the admission of the evidence on the ground that the former testimony represented an admission by Cattle Company that was not hearsay pursuant to Fed.R.Evid. 801(d)(2)(D).<sup>3</sup> The relevant portion of that rule states:

“(d) *Statements which are not hearsay.* A statement is not hearsay if — \* \* \*

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<sup>1</sup>Although the transcripts consisted primarily of the testimony of Mr. Marre, they also included testimony of the former controller and the former accountant for various Marre family members and/or entities, which Cattle Company specifically excluded from its hearsay objection.

<sup>2</sup>The Bankruptcy Court also admitted various exhibits from the state court action.

<sup>3</sup>The Bankruptcy Court ruled that the former testimony was admissible pursuant to F.R.Civ.P. 32(a)(2) because it was analogous to deposition testimony. That alternative basis for admitting the prior testimony is unnecessary in view of its admissibility pursuant to Fed.R.Evid. 801(d)(2)(D).

- (2) *Admission by party-opponent.* The statement is offered against a party and is . . . (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship. . . .”

Cattle Company contends in its Petition that no foundation was laid for the admission of the prior testimony pursuant to Rule 801(d)(2)(D). Cattle Company contends that “a showing [was] require[d] that declarant acted as the party’s agent *and* that the statement concerned a matter within the scope of his agency.” Petition, page 12 (Emphasis in original). Cattle Company contends that no such showing was made, that the evidence should not have been admitted, and that its admission resulted in a denial of due process of law.

**1. This Case Does Not Present an Issue Upon Which There Is a Conflict Among the Decisions of the Various Courts of Appeal nor a Significant or Recurring Issue Necessitating Resolution by This Court, but Instead Merely Involves the Application of an Unambiguous Rule to the Particular Facts of This Case.**

Petitioner points to no conflict among the decisions of the various courts of appeal regarding interpretation of Rule 801(d)(2)(D) of the Federal Rules of Evidence. Indeed, there is scarcely room for interpretation at all. The rule clearly and unambiguously permits admission of prior statements if an agency relationship exists, the statements were made during the agency relationship, and the statements concern a matter within the scope of the agency.

Nor is the question presented herein an important, recurring issue that should be resolved by this Court. It merely involves application of the plain language of the rule to the particular facts of this case. The issue in this case is simply



whether there was sufficient evidence before the Bankruptcy Court to establish that Mr. Marre was an agent of Cattle Company at the time he testified at the state court trial and that his testimony related to a matter within the scope of his agency. In granting the Petition in this case, the Court would be electing to resolve a factual dispute peculiar to the litigants in this case, which would be of little use in other cases involving different factual situations.

**2. The Question Presented in Cattle Company's Petition Was Not Raised at Any Stage of the Proceedings Below.**

Although Cattle Company asserted in the Bankruptcy Court, the District Court and the Court of Appeals that the state court evidence was inadmissible hearsay, Cattle Company contends for the first time in its Petition to this Court that the admission of such evidence was an error of constitutional magnitude, resulting in a denial of due process of law. This Court does not resolve questions or issues that were not raised at trial or earlier appellate levels absent exceptional circumstances. *See Duignan v. United States*, 274 U.S. 195, 200 (1927). Since the constitutional issue was not raised below, the Petition should be denied.

**3. In Any Event, Cattle Company's Claim Is Not Meritorious.**

Even if the Petition is granted, there is no basis for disturbing the decisions of the courts at all three levels below, which have uniformly ruled against Cattle Company. Indeed, Cattle Company's contention that the former testimony is inadmissible, which was rejected by the Court of Appeals with only a half sentence of discussion, borders on being frivolous.

The record below establishes that the Bankruptcy Court had more than sufficient evidence to conclude that the for-

mer testimony of Mr. Marre, who was found by the state court to be the alter ego of Cattle Company and who described himself in the state court as the “responsible person to protect the family interest in whatever areas there were”, could properly be admitted. The evidence in the Bankruptcy Court showed that:

1. Mr. Marre was an officer and director and the ranch manager of Cattle Company, a closely-held family corporation.

2. His former testimony concerned the Marre Ranch (Cattle Company’s principal asset), the interests of various Marre family members and entities therein, and the relationships and transactions among the Marres and their entities, including Cattle Company.

3. Mr. Marre was called as a witness by Cattle Company itself both in the state court and in the Bankruptcy Court, despite its asserted position that there is no evidence of his authority to testify on its behalf.

4. Mr. Marre had appeared at a prior hearing in the Bankruptcy Court and, although indicating that he was not an attorney, stated that he was “represent[ing]” Cattle Company.

5. Cattle Company’s own attorney even referred to Mr. Marre and Cattle Company interchangeably, stating to Mr. Marre that, “When I say ‘you’ I’m speaking of Luigi Marre Land & Cattle Company.”

There can be no doubt that Mr. Marre, as an officer and director, was Cattle Company’s agent. Nor can there be any doubt that the former testimony, centering on the Marre Ranch and transactions among the Marres, related to a matter within the scope of Mr. Marre’s agency as an officer. The Court of Appeals was plainly correct in holding that

the requirements of Fed.R.Evid. 801(d)(2)(D) had been met.<sup>4</sup>

Even if the Court were to determine that the admission of the state court evidence was erroneous, the admission was harmless and would not justify a reversal of the judgment. The same evidence could have been adduced (albeit at a greater expense of judicial resources) by repeating to Mr. Marre the same questions that had been asked in the state court. If his answers were the same as in the state court, the record would be identical; if they differed, the former testimony would then be admissible as a prior inconsistent statement pursuant to Fed.R.Evid. 801(d)(1). Moreover, as the Bankruptcy Court noted in its Memorandum of Decision, the state court exhibits and testimony "might not [have been] necessary because of the testimony of Robert B. Marre himself in this trial. Their use was cumulative only." The introduction of Mr. Marre's state court testimony was, at most, harmless error.<sup>5</sup>

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<sup>4</sup>The record in this case also suggests that the former testimony would similarly be admissible under Fed.R.Evid. 801(d)(2)(C), which permits admission of "a statement by a person authorized by [the adverse party] to make a statement concerning the subject." Cattle Company, being a corporation, can only speak through its officers, directors, employees and agents, and this Court has observed that an agent's authority may be implied and collected from the circumstances. *Martin v. Webb*, 110 U.S. 7, 14 (1884). Here the circumstances overwhelmingly imply that Mr. Marre, who was an officer and director called by Cattle Company to testify in both the state court and the Bankruptcy Court and who was scarcely distinguishable from Cattle Company itself, was in fact authorized to be its spokesman.

<sup>5</sup>The Bankruptcy Court trial was not before a jury. Courts generally will not reverse a nonjury trial court for the erroneous admission of evidence unless all of the competent evidence is insufficient to support the judgment. See *Thompson v. Carley*, 140 F.2d 656, 660 (8th Cir. 1944).

CONCLUSION.

For these reasons, the Petition for Writ of Certiorari should be denied.

Dated: June 15, 1983.

Respectfully submitted,

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## **APPENDIX.**

Pursuant to Supreme Court Rule 28.1, Respondent Pacific Gas and Electric Company submits the following list of subsidiary and affiliate corporations:

- Pacific Gas Transmission Company
- Alberta Natural Gas Company Ltd.
- ANGUS Chemical Company
- ANGUS Chemie Gamble
- ANGUS Petrotech Corporation
- Pacific Transmission Supply Company
- Rocky Mountain Gas Transmission Company
- Pacific Indonesia LNG Company
- Standard Pacific Gas Line Incorporated
- Alaska California LNG Company
- Alberta and Southern Gas Co. Ltd.
- Calaska Energy Company
- Eureka Energy Company
- Gas Lines, Inc.
- Natural Gas Corporation of California
- Pacific Conservation Services Company
- Pacific Gas LNG Terminal Company
- Pacific Gas Marine Company
- Pacific Gas and Electric Gas Supply Co.
- Pacific Gas and Electric Finance Company N.V.

Service of the within and receipt of a copy thereof is  
hereby admitted this ..... day  
of June, A.D. 1983

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